90-1269

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

FUNCTION JUNCTION, INC., et al.,
Petitioners,

v.

PAUL CROWE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ERIC A. LATINSKY, ESQUIRE
1206 South Ridgewood Avenue
Daytona Beach, Florida 32114
(904) 257-5555
Fla. Bar #302831

Attorney for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I. Does the Daytona Beach "nudity, sexual conduct prohibited" ordinance which as construed prohibits exposure in commercial establishments where liquor may be consumed, of any portion of the female breast below the top of the areolae and any portion of the buttocks, irrespective of context or pervasiveness, whether live or on film or photographs, allow the police discretion to make arrests in a selective or discriminatory manner, in violation of the First and Fourteenth Amendments and contrary to Houston v. Hill, 482 U.S. 451 (1987)?

II. Does the failure to narrowly construe the Daytona Beach "nudity, sexual conduct prohibited" ordinance which, as broadly interpreted, prohibits in commercial establishments where liquor may be consumed, entertainment entitled to the protection of the First Amendment which depicts exposure of any portion of the buttocks or any portion of the female breast directly below the top of the areolae, whether live or on film or in the form of a photograph, violate the First Amendment as construed in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)?

III. Does the imposition of attorney fees and double costs as sanctions upon the parties under Fed. R. App. P. 38 without any notice or an opportunity to be heard in a case which all prior courts have found the issue fairly debatable, violate due process of law contrary to this Court's decision in Roadway Express, Inc. v. Piper, 447 U.S.752 (1980).

LIST OF PARTIES BELOW

PETITIONERS

FUNCTION JUNCTION, INC., a Florida Corporation

PINK PUSSYCAT, INC., d/b/a Red Garter Club, a Florida Corporation

DEL PERCIO, INC., d/b/a Single Shack, a Florida Corporation

CHRIS GEANEAS

DAWN BOIDO (HEISER)

DENISE DEL PINTO

LESLIE GRIER (HAMLIN)

RESPONDENTS

PAUL CROWE, as Chief of Police of Daytona Beach, Florida. The former Chief of Police, Charles W. Willets, was a party in both courts below. However, pursuant to Rule 35.3 of this Court, his successor has been designated as a Respondent in this Petition.

CITY OF DAYTONA BEACH, a former municipal corporation

There are no entities to report or list pursuant to this Court's Rule 28.1.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

FUNCTION JUNCTION, INC.,
Chris Geaneas, Pink Pussycat, Inc.,
d/b/a Red Garter Club, DEL PERCIO,
INC. d/b/a Shingle Shack, DAWN
BOIDO (HEISER), DENISE DEL PINTO
and LESLIE GRIER (HAMLIN),

Petitioners,

PAUL CROWE, as Chief
of Police of Daytona Beach, Florida and
CITY OF DAYTONA BEACH, FLORIDA, an
incorporated municipality

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as Geaneas v. Willets, 911 F. 2d 579 (11th Cir. 1990) and is reprinted in Appendix A. The unreported Memorandum Opinion and Order on Motion for Summary Judgment of the United States District Court for the Middle District of Florida is reprinted in Appendix C. The reported Order of the District Court dismissing this case,

Geaneas v. Willets, 715 F.Supp. 334 (1989), is reprinted in Appendix D.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion on September 10, 1990. Petitioners' Request for Rehearing and Suggestion for Rehearing En Banc was denied on November 9, 1990. Appendix B. The opinion of the Court of Appeals, upholding the final judgment of the District Court, constitutes a final judgment in a civil case. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment One

Congress shall make no law...abridging the freedom of speech...

United States Constitution, Amendment Fourteen, Section One

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdicition the equal protection of the laws.

United States Constitution, Amendment Twenty-one, Section Two

> The transportation or importations into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited

Provisions of Daytona Beach Municipal Code

> The applicable provisions of the Daytona Beach Municipal Code are included in the opinion of the Court of Appeals, as reprinted in Appendix A. Section 5-25, Nudity, Sexual Conduct Prohibited and Section 5-1, defining establishments dealing in alcoholic beverages.

STATEMENT OF THE CASE

At issue is Daytona Beach Ordinance 81-334 enacted on October 21, 1981, and codified as City of Daytona Beach Code Section 5-25. PINK PUSSYCAT, INC., FUNCTION JUNCTION, INC., and DEL PERCIO, INC. are all commercial establishments within the City of Daytona Beach which attempted to present female dancers as entertainment while allowing the sale and consumption of alcohol. The employees and agents of the establishments, including owners such as Geaneas, bartenders such as Boido, and dancers, including Del Pinto and Grier, were subject to frequent inspections and charges under section 5-25.

On September 23, 1982, County Judge Norton Josephson (see Appendix E), in a case involving Petitioner, Grier, narrowly construed Section 5-25(a) finding:

> "that in order to find any person in violation of the ordinance, all of his order buttocks must be exposed"

and dismissed the charge as it was uncontradicted that Ms. Grier's buttocks were partially covered.

The City of Daytona Beach ignored the interpretation of Judge Josephson and continued to make additional charges broadly construing the ordinance. On April 21, 1983, County Judge McDermott dismissed a group of charges, including those involving Petitioners Grier and Del Pinto, adopting the ruling of Judge Josephson regarding the buttocks and narrowly construing the breast portion of the ordinance to require that "a female person expose at least a portion of the areolae to the public view to be in violation" (Appendix F). The gist of the breast ruling was:

> In accordance with the principles laid down in Foley the court interprets the phrase "at or below the areola" to mean from the upper portion of the areola to the bottom of it on each breast. This would not require a covering on a line running from the top of one areola across to the top of the other. That interpretation would require more covering than is presently seen on our beaches or behind ski tow boats.

On May 10, 1983, the ruling of Judge Josephson in the Grier case was upheld on appeal by the Circuit Court in and for Volusia County on November 21, 1983, Judge C. McFerrin Smith, III issued an opinion also indicating the ordinance should be narrowly construed. Appendix G.

On May 9, 1983, a Complaint was filed by Petitioners in the District Court requesting injunctive and declaratory relief and money damages under 42 U.S.C. § 1983. The complaint included a request that the Court enjoin enforcement in violation of the narrowing decisions of the Volusia County courts.

On July 27, 1983, the District Court entered an order staying this cause until various pending state court litigation was resolved.

In 1984 the Fifth District Court of Appeal for the State of Florida noted the difficulty the lower courts had in interpreting the ordinance and found it to be "vague, overbroad, not fairly enforceable, and thus unconstitutional". See Del Percio v. City of Daytona Beach, 449 So.2d 323 (Fla. 5th DCA 1984). Unfortunately for Petitioners the Florida Supreme Court reversed the ruling of the Fifth District Court of Appeal in City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985) stating that "the plain meaning of the ordinance was that no portion of the breast directly or laterally below the top of the areola may be exposed to public view." The City directed Petitioners to have their performers comply and to remove all photographs from the premises depicting this breast exposure.

The Petitioners continued to seek relief in the District Court and despite the fact that Petitioners were willing to operate as a bottle club or sell only liquor produced within the state the court issued its Memorandum Opinion and Order of Motions for Summary Judgment (Appendix C) on January 12, 1988, finding the ordinance facially valid.

The case proceeded to trial on February 22, 23 and 28, 1989, on the "as applied" and selective enforcement issues. At trial Petitioners proved that numerous violations of the ordinance are ignored by the Daytona Beach Police Department while they are singled out for prosecution. The District Court stated:

> The evidence was undisputed that in commercial establishments dealing in alcohol, excluding such establishments which provided exotic dance as entertainment, portions of the female breast below the areola and portions of the buttocks were exposed without arrests being made, even though the violations were known to Daytona Beach police officers who were present at the time. These violations of the Ordinance were more prevalent during "bike week" and "spring break", when wet t-shirt contests and bikini contests at the pool-side bars along the city's famous beach resulted in numerous technical violations of the Ordinance, with an estimated fifty percent or more of the females present at these events wearing bathing suits exposing a portion of the buttocks. (Emphasis supplied)
>
> (Appendix D)

The District Court agreed with Petitioners that the portion of the ordinance prohibiting buttocks exposure is somewhat vague but extrapolated the section stating:

> After consideration of the wording of the Ordinance itself, the various interpretations of the Ordinance by the state trial courts, and the Florida Supreme Court's ruling on the breast portion of the Ordinance, this court is of the opinion that the Florida Supreme Court would interpret the buttocks portion of the ordinance to

> prohibit exposure of any portion of the buttocks. Further, the state's highest court would probably define the word "buttocks" to include the area at the rear of the body which lies between two imaginary lines running paraliel to the ground when a person is standing, the first or top such line drawn at the top of the cleavage of the nates and the second or bottom line drawn at the lowest visible point of this cleavage or the lowest point of the curvature of the fleshy protuberance, whichever is lower, and between two imaginary lines on each side of the body, which lines are perpendicular to the ground and to the horizontal lines described above, and which perpendicular lines are drawn through the point at which each nate meets the outer side of each leg. The Ordinance would be violated, therefore, if any portion of this area is visible from any vantage point. Since this is the "core meaning" which "persons of ordinary intelligence" would draw from the language of the Ordinance as it is written, the Ordinance is not impermissibly vague. See High Ol' Times v. Busbee, 673 F.2d 1225 (11th Cir. 1982) (Emphasis in the original)
>
> (Appendix D)

The District Court did not impose any sanctions upon Petitioners and at the close of the trial described the case as interesting in terms of both the law and facts. The Petitioners appealed from the ruling of the District Court dismissing the case.

On September 20, 1990, the Eleventh Circuit Court of Appeal issued its ruling denying relief to Petitioners, holding the appeal frivolous under Fed.R.App.P. 38, sua sponte and imposing sanctions of double costs and attorney fees for the appeal.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION UPHOLDING THE DAYTONA BEACH NUDITY, SEXUAL CONDUCT PROHIBITED ORDINANCE WHICH IS SELECTIVELY ENFORCED AGAINST PERFORMERS IS CONTRARY TO THE APPLICABLE DECISIONS OF THIS COURT.

As previously noted Daytona Beach Ordinance 5-25 as construed by the lower courts prohibits the exposure in establishments, including restaurants, hotels and fraternal meeting facilities where the consumption of alcoholic beverages is permitted, of any portion of the female breast directly or laterally below the top of the areolae and any portion of the buttocks, whether live or in the form of film or photograph. At trial Petitioners proved that the enactment was enforced in a discriminatory manner against establishments presenting exotic dancers as entertainment and not against the thousands of other violators at pool bars located at Daytona Beach hotels exposing prohibited portions of their breasts or buttocks. The Eleventh Circuit Court of Appeals found the selective (discriminatory) enforcement claim was entirely without purpose because Petitioners did not desire the ordinance to be enforced uniformly. Specifically the Eleventh circuit stated:

> Nor do the plaintiffs contend, on selective enforcement grounds, that criminal prosecutions against them should be dismissed; although the City did bring criminal charges against some of the plaintiffs, no charges are currently pending. Rather, the plaintiffs

> request a declaratory judgment that the City's selective enforcement is unconstitutional and an injunction preventing the City from selectively enforcing the ordinance against them.
>
> The district court held that the plaintiffs failed to prove a selective enforcement claim, but even if the plaintiffs could prove their claim, an injunction would not necessarily prevent the City from enforcing the ordinance against them. The court would enjoin the City not to enforce the ordinance against the plaintiffs **selectively**. The City could satisfy such a mandate simply by enforcing the ordinance against all similarly situated violators. Thus, even if the plaintiffs were to succeed on this selective enforcement claim, they would not escape the ordinance's application to them; they could only require the City to enforce it more widely--a result that is clearly not what the plaintiffs desire. (Emphasis supplied)
>
> (Appendix A)

In fact, the criminal prosecutions against Grier, Boido and Del Pinto had already been dismissed and they had requested an injunction so they would not be subject to additional arrests. Petitioners did desire the Ordinance to be enforced equally. The Eleventh Circuit ruling is contrary to numerous rulings of this Court discussing discriminatory enforcement.

The United States Supreme Court in Houston v. Hill, 482 U.S. 451(1987) considered a case where Mr. Hill requested similar relief in a civil case after his acquittal of the criminal charges. The United States Supreme Court stated:

> Houston's ordinance criminalizes a substantial amount of constitutionally protected speech, and

> accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily, App 77, yet only some individuals--those chosen by the police in their unguided discretion--are arrested. Far from providing the "breathing space" that "First Amendment freedoms need...to survive'", NAACP v. Button, 371 U.S. (1963), the ordinance is susceptible of regular application to protected expression. We conclude that the ordinance is substantially overbroad, and that the Court of Appeals did not err in holding it facially invalid.

An additional decision of this Court granting injunctive relief in a civil case due to the potential for arbitrary suppression of First Amendment liberties is Kolender v. Lawson, 461 U.S. 352 (1983). In footnote 15 of the decision the United States Supreme Court lists additional citations on the discriminatory enforcement issue. The footnote states:

> See,, e.g., Kolender v. Lawson, 461 U.S. 352, 360-361, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983) (identification requirement unconstitutional because it accords police "full discretion"); Smith v. Goguen, 415 U.S. 566, 575, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections; (thereby) entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat'", quoting Gregory v. City of Chicago, 394 U.S.111, (Black, J., concurring); Papachristou v. City of Jacksonville, 405 U.S. 156, 170, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972) (vagrancy ordinance "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure'"), quoting Thornhill v. Alabama, 310 U.S. 88, 97-98, 84 L.Ed.1093, 60 S.Ct.736

(1940); Coates v. Cincinnati, 402 U.S.611, 611-616, 29 L.Ed.2d 2214, 91 S.Ct. 1686, 58 Ohio Ops 2d 481 (1971) (statute prohibiting "annoying" conduct "contains an obvious invitation to discriminatory enforcement"). Like many of the ordinances in these cases, Houston's effectively grants police the discretion to make arrests selectively on the basis of the content of the speech. Such discretion is particularly repugnant given "[t]he eternal temptation...to arrest the speaker rather than to correct the conditions about which he complains." Younger v. Harris, 401 U.S. 37,65, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971) (Douglas, J., dissenting).

The instant case does not involve merely an invitation to discriminatory enforcement but involves actual discriminatory enforcement. The District Court also found that the various officers differed in their opinions as what amount of exposure would result in arrest.

This Court should grant the Petition for Writ of Certiorari as the opinion of the Eleventh Circuit is directly contrary to the decisions of this Court concerning penal enactments which are or have the potential for discriminatory enforcement such as Houston v. Hill, supra, and Kolender v. Lawson, supra, and the numerous authorities cited therein.

II. THE ELEVENTH CIRCUIT OPINION APPROVING THE BROAD INTERPRETATION OF THE ORDINANCE WHICH PROHIBITS EXPOSURE OF ANY PORTION OF THE BUTTOCKS AND ANY PORTION OF THE FEMALE BREAST BELOW THE TOP OF THE AREOLAE, IRRESPECTIVE OF CONTEXT OR PERVASIVENESS, IS IN DIRECT

CONFLICT WITH DECISIONS OF THIS COURT.

In the instant case the District Court has improperly rejected the narrowing construction of the state Trial court on the buttocks issue and extrapolated the broadest meaning possible contrary to numerous decisions of the United States Supreme Court. In addition the federal courts have reaffirmed the position of the Florida Supreme Court rejecting the narrowing constructions of the lower courts and finding that the broadest construction would be adopted and therefore no portion of the female breast directly or laterally below the top of the areolae could be exposed.

The state trial court in cases involving Petitioners Grier and Del Pinto narrowly construed the buttocks prohibition finding:

> In construing an ambiguous statute it is proper to take into consideration the particular evils at which the legislation is aimed or mischief sought to be awarded (30 Fla. Jur., Page 203).
>
> The word buttocks by medical definition and common language is to say the least ambiguous for one cannot define the beginning or ending of that part of the anatomy. The evil sought to be avoided by this ordinance is nude dancing, not semi-nude dancing. To construe the ordinance to read partially exposed buttocks would place an unbridled discretion upon the Courts to determine how much of the buttocks should be partially exposed in order to find a violation of the ordinance.

It is therefore the interpretation of this Court that in order to find any person in violation of the ordinance, all of his or her buttocks must be exposed.

(Appendix E)

The District Court rejected the limiting construction and adopted the broadest construction possible stating:

> After consideration of the wording of the Ordinance itself, the various interpretations of the Ordinance by the state trial courts, and the Florida supreme Court's ruling on the breast portion of the Ordinance, this Court is of the opinion that the Florida supreme Court would interpret the buttocks portion of the ordinance to prohibit exposure of any portion of the buttocks. Further, the state's highest court would probably define the word "buttocks" to include the area at the rear of the body which lies between two imaginary line running parallel to the ground when a person is standing, the first or top such line drawn at the top of the cleavage of the nates and the second or bottom line drawn at the lowest visible point of this cleavage or the lowest point of the curvature of the fleshy protuberance, whichever is lower, and between two imaginary line on each side of the body, which lines are perpendicular to the ground and to the horizontal lines described above, and which perpendicular lines are drawn through the point at which each nate meets the outer side of each leg. The Ordinance would be violated, therefore, if any portion of this area is visible from any vantage point. Since this is the "core meaning" which "persons of ordinary intelligence" would draw from the language of the Ordinance as it is written, the Ordinance is not impermissibly vague. See High Ol' Times v. Busbee, 673 F.2d 1225 (11th Cir. 1982).
>
> (Appendix D)

The rejection of the construction of the state court violates several decisions of this Court. For example, in Houston v. Hill, supra, the Court stated:

> We have long recognized that trial court interpretations, such as those given in jury instructions, constitute "a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance." Terminiello, 337 U.S., at 4, 93 L.Ed. 1131, 69 S.Ct. 894.

While it is true that the Florida Supreme Court had rejected the narrowing interpretation of the term below the top of the areolae in City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985), the buttocks construction remained undisturbed.

Ordinance 5-25 clearly on its face prohibits a wide range of expression in commercial establishments where liquor may be consumed, Schad v. Borough of Mt. Ephriam, 452 U.S. 61 (1981). In Schad the United States Supreme Court stated:

> Nor may an entertainment program be prohibited solely because it displays the nude human figure. "[N]udity alone" does not place otherwise protected material outside the mantle of the First Amendment. Jenkins v. Georgia, supra, at 161 41 L.Ed. 642, 94S.Ct. 2750; Southeastern Promotions, Ltd. v. Conrad, supra; Erznoznik v. City of Jacksonville, supra, at 211-212, 213 45 L.Ed.2d 125, 95 S.Ct. 2268. Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation. Doran v. Salem Inn, Inc., supra;;

Southeaster Promotions, Ltd. v. Conrad, supra; California v. LaRue, supra.

The Schad decision makes clear that this ordinance which as construed prohibits all entertainment programs whether live or on film or by photograph due to exposure of even minimal portions of the female breast and human buttocks. The Eleventh Circuit was not concerned by the fact that the ordinance prohibited forms of attire that are socially acceptable and are regularly worn on the beaches. This is contrary to the United States Supreme Court opinion in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) finding that an ordinance which sweepingly forbids display of films containing any covered buttocks or breast unconstitutional in violation of the First Amendment and Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) declaring unconstitutional an ordinance which makes criminal activities which are normally innocent.

The lower court's duty was to consider narrowing construction rather than rewriting the ordinance. In Virginia v. American Booksellers Assn., 484 U.S. 383 (1988) this Court stated:

> It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. Erznoznik v. City of Jacksonville, 422 U.S. 205, 45 L.Ed.2d 125, 95 S.Ct. 2268 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). The key to application of this principle is

> that the statute must be "readily susceptible" to the limitation; we will not rewrite a state law to conform it to constitutional requirements.

While the ordinance if narrowly construed would apparently be constitutional under a Twenty-first Amendment analysis, see City of Newport v. Iacobucci, 479 U.S. 92 (1986), New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) and California v. LaRue, 409 U.S. 109 (1972), the failure to narrowly construe the enactment violates the First Amendment at construed in Schad, supra, Erznoznik, supra, Hill, supra and Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). The LaRue, decision stated in footnote 5:

> 5. Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in Segram & Sons v. Hostetter, 384 U.S. 35, 52, 16 L.Ed. 336, 86 S.Ct. 1254 (1966), is equally in point here: "Although it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so construed, the legislation is ccnstitutionally valid." (Emphasis supplied)

This case does contain specific applications and the problems should be considered.

Moreover, this Court recently granted certiorari in Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir.1990), cert. granted, Barnes v. Glenn Theater, ___ U.S. ___, 111 S.Ct. 90, 112 L.Ed.2d 15 (1990). The concurrence

at page 1101 indicates that nudity is so narrowly defined that a woman wearing tiny pasties and a g-string is considered clothed. This is similar to the definition in Iacobbucci prohibiting exposure of the pubic area, anus, vulva, genitals or the portion of the breast known as the areola, nipple or simulation thereeof. Petitioners do not argue that such a narrowly drawn prohibition is improper in a liquor licensed establishment but that the Ordinance construed in its broad terms as in this case is violative of the First Amendment.

The Eleventh Circuit's opinion is contrary to the principles set forth in Erznoznik, Schad, Papachristou and the other decisions of this Court cited herein and for that reason this Court should grant review. An additional reason for review is to clarify whether a penal ordinance enacted under the state's broad power to regulate alcohol sales under the Twenty-first Amendment which restricts rights of free expression should be narrowly construed.

III. THE IMPOSITION OF SANCTIONS UPON THE PETITIONERS WITHOUT ANY PRIOR NOTICE OR AN OPPORTUNITY TO BE HEARD IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN ROADWAY EXPRESS, INC. V. PIPER, 447 U.S. 752 (1980).

Not only did the Eleventh Circuit deny Petitioners any relief but sanctions were imposed without notice or an opportunity to be heard. This case involves a unique factual record and in fact the district judge stated on the record that it was an interesting case in terms of the law and facts. In addition, County Court Judges Josephson (Appendix E) and McDermott (Appendix F) had granted relief by narrowly construing the ordinance, Circuit Judge Foxman had affirmed Josephson's order, Circuit Judge Smith also entered a favorable appellate ruling (Appendix G). In Del Percio v. City of Daytona Beach, 449 So.2d 323 (Fla. 5th DCA 1984) the Fifth District Court of Appeal found the ordinance "vague, overbroad, not fairly enforceable and thus unconstitutional" and in City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985) Chief Justice Boyd and Justice Atkins dissented stating the ordinance was unconstitutionally ambiguous and Justice Overton dissented stating the City should rewrité and enact a proper Ordinance. Based upon the law and the learned judges and justices who agreed with Petitioners' position in whole or

in part the arguments cannot be deemed frivolous. This case creates an intolerable chilling effect on all litigants desiring to distinguish their case from other unsuccessful but similar challenges by exposing them to sanctions without any due process of law.

In Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), a case involving sanctions imposed against an attorney under 28 U.S.C., section 1927, this Court stated:

> The power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes. See Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Calif. L. Rev. 264 268 (1979). Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. But in a proper case, such sanctions are within a court's powers. (Emphasis supplied)

In this case the District Court of Appeal imposed sanctions, sua sponte, without any notice or an opportunity to be heard. In Braley v. Cambell, 832 F.2d 1504 (10th Cir. 1987) a case involving sanctions imposed upon an attorney, the court en banc discussed the procedure for imposing sanctions. The court stated:

> In such a case, if a party has already made a motion or request in its brief that sanctions be imposed, and identified the party or counsel it wants to be sanctioned, the notice requirements are satisfied, so long as the court gives the person against whom

> sanctions are requested an opportunity to file a brief or otherwise be heard before imposing sanctions. See, e.g. Herzfeld, 769 F.2d at 647. On those occasions when the court intends to consider such sanctions sua sponte, due process is satisfied by issuance of an order to show cause why a sanction should not be imposed and by providing a reasonable opportunity for filing a response. See Van Sickle v. Holloway, 791 F.2d 1431, 1437 (10th Cir. 1986); see also Reliance, 792 F.2d at 1139

In Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) Rule 11 sanctions were discussed. The Eleventh Circuit Court of Appeal stated that due process required that a party be given fair notice of the possible imposition of Rule 11 sanctions and of the reason for their imposition. In Donaldson the Eleventh Circuit noted that due process demanded more specific notice to a client than an attorney. The Court also found that the party to be sanctioned was entitled to an opportunity to respond.

The tendency of the court to impose sanctions without notice on unsuccessful litigants in the Circuit Court of Appeal has a drastic chilling effect on attorneys and litigants who desire to seek review. This is especially true in cases involving potentially unpopular issues such as adult entertainment. Sanctions should not be imposed lightly or without notice and an opportunity to be heard. The decision of the Eleventh Circuit is inconsistent with the decision of the United States Supreme Court in Piper and the Tenth Circuit in Braley v. Campbell and for that reason review should be granted.

CONCLUSION

Absent review by certiorari by this Court cities in the Eleventh Circuit may selectively and discriminately enforce broad enactments which restrict First Amendment rights in any commercial establishment where liquor is consumed. Potential litigants will be fearful to defend their position in court due to the clear and present danger of sanctions. This Court should grant the Writ of Certiorari to remove the chilling effect of the ruling of the Eleventh Circuit upon the presentation of disputes based upon the First Amendment in the Eleventh Circuit.

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Respectfully submitted,

Eric A. Latinsky, Esquire
1206 South Ridgewood Avenue
Daytona Beach, Florida 32114
(904) 257-5555
Fla. Bar #302831
FAX # (904) 252-5713

Attorney for Petitioner